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IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF ASIAN AMERICANS ADVANCING JUSTICE | AAJC, NATIONAL ASSOCIATION OF LATINO ELECTED AND APPOINTED OFFICIALS EDUCATION FUND, LATINOJUSTICE PRLDEF, AND NINETEEN OTHER ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are twenty-two national and local nonprofit organizations that protect, advance, and support the rights of Asian American and Latino communities in the United States.

Asian Americans Advancing Justice | AAJC (AAJC) is a national nonprofit organization founded in 1991. Based in Washington, D.C., AAJC works to advance and protect civil and human rights for Asian Americans and to build and promote a fair and equitable society for all. AAJC is one of the nation's leading experts on issues of importance to the Asian American community, including minority voting and voting rights. Along with its Advancing Justice affiliates, AAJC works to promote justice and bring national and local constituencies together through community outreach, advocacy, and litigation.

The National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund is a Section 501(c)(3) nonprofit, nonpartisan organization whose members include the nation's more than 6,100 elected and appointed Latino officials. NALEO Educational Fund is dedicated to facilitating full Latino participation in the American political process, from citizenship to public service.

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[1] Petitioner and Respondents have consented to the filing of this brief in blanket consents that have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) was founded in New York City in 1972. LatinoJustice's continuing mission is to protect the civil rights of and promote justice for the greater pan-Latino community in the United States. During its 45-year history, LatinoJustice has advocated for and defended the constitutional rights and the equal protection of all Latinos under the law and has litigated numerous precedent-setting legal reform cases challenging multiple forms of discrimination in fair housing, employment, education, language rights, redistricting, and the right to vote.

Descriptions of the additional nineteen *amici* are included in the attached appendix. *Amici* include some of the nation's most prominent Asian American, Latino, and other community nonprofit organizations. Individually, and collectively, *amici* advocate for civil rights and equal treatment for Asian Americans and Latinos through a combination of public policy analysis, civic engagement, professional development initiatives, and legal advocacy. *Amici* are concerned with Ohio's voter purging process as well as those of other states, like Georgia, which has a higher population of Asian American and Latino voters, and which have similar purging practices. *See, e.g.*, *Common Cause v. Kemp*, Case No. 17-11315 (11th Cir. filed Mar. 23, 2017).

SUMMARY OF ARGUMENT

Ohio's Supplemental Process purports to purge from its rolls those voters who have moved, but, in reality, it targets voters for failure to vote in

violation of the National Voter Registration Act (NVRA). And, in doing so, the Supplemental Process disproportionately affects Asian Americans and Latinos.

Asian American and Latino registrants vote at lower rates than the rest of the U.S. population. Because of their lower voting rates, Asian Americans and Latinos are more likely to be subject to Ohio's Supplemental Process and purged from the registration lists than any other racial group.

Asian Americans and Latinos already encounter a number of barriers to voting. For one, a large percentage of the U.S. population is comprised of Asian Americans and Latinos for whom English is not their first language and who may not be fluent in English. As a result, English-only election-related mailings create a barrier to access and comprehension which disenfranchises limited English proficient (LEP) voters, many of whom are Asian American and/or Latino. Notably, Ohio's Confirmation Notice, which explains the steps voters must take to avoid removal pursuant to the Supplemental Process and the consequences of failing to respond, is generally provided in English only. Asian Americans and Latinos also face the brunt of other constraints that the state places on voting. Ohio's Supplemental Process is just one of a slate of policies on registration and voting that have impeded the ability of otherwise eligible Asian Americans and Latinos to register and vote.

In light of the barriers discussed herein, once purged, it is unlikely that many Asian Americans and Latinos will re-register, return to the polls, or,

even if they attempt to vote, be allowed to cast a ballot. This is exactly the disenfranchisement that Congress warned about when enacting the NVRA, especially with respect to low-income voters and those facing language barriers.

Ohio over purges registered voters because its Supplemental Process is not tailored to remove people who have moved. Indeed, the Supplemental Process has resulted in the purging of *thousands* of people based on Ohio's faulty premise that these voters moved. This requires the thousands of purged people to re-register, even though their residence has not changed since they last voted. At best, the Supplemental Process is an overly-broad solution to a relatively minor problem that removes voters, particularly Asian Americans and Latinos, for not voting, a result that Congress explicitly prohibited. Accordingly, the Court should uphold the decision of the Sixth Circuit.

ARGUMENT

I. OHIO'S SUPPLEMENTAL PROCESS IS PREDICATED ON A FAULTY PREMISE THAT DISPROPORTIONATELY IMPACTS ASIAN AMERICAN AND LATINO VOTERS

Section 8 of the NVRA permits states to remove voters from its list of registered voters for four reasons: (1) at the request of the registrant, (2) as provided by state law by reason of criminal conviction or mental incapacity, (3) upon death of the registrant, and (4) upon a change in the residence of

the registrant. 52 U.S.C. § 20507(a)(3), (a)(4). Ohio uses two processes to remove voters for a change in residence. *First*, Ohio uses National Change of Address (NCOA) information to send voters who report a change of address to the U.S. Postal Service (USPS) a Confirmation Notice, in accordance with Section 8(d)(2) of the NVRA, 52 U.S.C. § 20507(d)(2). This practice, known as the "NCOA Process," is not at issue. *Second*, Ohio supplements the NCOA Process with its "Supplemental Process," which assumes that a registrant's failure to vote in a two-year period means that such a person has moved.[2] The Supplemental Process uses the registrant's non-voting as a trigger to send a Confirmation Notice to an otherwise properly registered voter, purportedly to "confirm" that the registrant moved. But non-voting is not evidence that a person has moved, exposing the fundamental premise underlying the Supplemental Process as faulty. In turn, the Supplemental Process results in the significant disenfranchisement of voters, particularly Asian Americans and Latinos, for not voting, in violation of the NVRA. 52 U.S.C. § 20507(b)(2).

A. Not Voting Does Not Indicate that a Registered Voter Has Moved and Is Insufficient to Trigger Removal

Ohio's premise for the Supplemental Process is that a person's failure to vote indicates a change in

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[2] Ohio Sec'y of State, Directive 2015-09, 2015 General Voter Records Maintenance Program at 2 (May 19, 2015), Exhibit to Joint Stipulation, *A. Philip Randolph Inst. v. Husted*, No. 2:16-cv-00303-GCS-EPD (S.D. Ohio Apr. 11, 2016) ECF 16-1.

residence. The facts, however, do not support this premise. Non-voting is common and occurs for many different reasons, very few of which have anything to do with having moved; as such, non-voting, without more, is an insufficient basis upon which to assume that a voter has moved.

The U.S. Census Bureau compiles data on the most common reasons people did not vote. In the last three federal elections, the most common reasons for non-voting were *one*, the voter was not interested; *two*, the voter was too busy to vote or had a scheduling conflict; *three*, the voter did not like the candidates or campaign issues; *four*, the voter was sick; *five*, the voter was out of town; or *six*, the voter forgot to vote.[3] Asian American and Latino registered voters expressed the same top reasons for not voting. *Id.* These account for well over 75% of the reasons given by registered voters for not voting. *Id.* None supports Ohio's premise for its Supplemental Process.

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[3] U.S. Census Bureau, Table 10. Reasons for Not Voting, by Selected Characteristics: November 2016, https://goo.gl/SbTb6U ("2016 Top Reasons for Non-Voting"); U.S. Census Bureau, Table 10. Reasons for Not Voting, by Selected Characteristics: November 2014, https://goo.gl/mzep9F ("2014 Top Reasons for Non-Voting"); U.S. Census Bureau, Table 10. Reasons for Not Voting, by Selected Characteristics: November 2012, https://goo.gl/MdsT7h ("2012 Top Reasons for Non-Voting").

Table 1. Reasons Registered Voters Did Not Vote in 2012, 2014, and 2016[4]

Reason	2016	2014	2012
Illness or disability	11.7%	10.8%	14.0%
Out of town	7.9%	9.5%	8.6%
Forgot to vote	3.0%	8.3%	3.9%
Not interested	15.4%	16.4%	15.7%
Too busy, conflicting schedule	14.3%	28.2%	18.9%
Transportation problems	2.6%	2.1%	3.3%
Did not like candidates or campaign issues	24.8%	7.6%	12.7%
Registration problems	4.4%	2.4%	5.5%
Bad weather conditions	0%	0.4%	0.8%
Inconvenient polling place	2.1%	2.3%	2.7%
Other reason	11.1%	9.1%	11.1%
Don't know or refused to answer	2.7%	2.9%	3.0%

Only one reason provided *may* implicate Ohio's stated reason for the Supplemental Process: registration issues. In 2016, 4.4% of registrants reported an inability to vote due to registration issues and the same was reported by 3.3% of Asian Americans and 5.4% of Latinos.[5] In 2014, 2.4% of all registrants and 2.4% of Asian American registrants reported registration issues, as did 2.5% of Latino

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[4] *Id.*

[5] 2016 Top Reasons for Non-Voting, *supra* note 3.

registrants.[6] In 2012, 5.5% of all registrants cited registration issues, as did 5.2% of Asian Americans and 6.1% of Latinos.[7] But there are numerous registration issues implicated in this category that are independent of having moved. The U.S. Census Bureau explained that this category captured those who "didn't receive absentee ballot" as well as those "not registered in current location."[8] Even if this category captured only people who moved but failed to update their registration, this represents an issue involving between 2.4 and 5.5% of all registered voters who did not vote in a given election—a far cry from the 100% of registered voters who did not vote but are targeted for removal by Ohio's Supplemental Process.

B. Voter Registration and Turnout Fluctuates Between Elections and Is Significantly Lower for Midterm Elections than for Presidential Elections

Voter registration and turnout in Ohio, like the nation itself, is significantly lower for midterm elections than for presidential elections. Many registered voters—including many Asian American and Latino voters—do not vote in midterm elections, which is no indication that those registrants have

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[6] 2014 Top Reasons for Non-Voting, *supra* note 3.

[7] 2012 Top Reasons for Non-Voting, *supra* note 3.

[8] U.S. Census Bureau, November 2016 Voting and Registration Supplement, Technical Documentation CPS-16, at 7-2 (Mar. 2017), https://goo.gl/zwYDhN.

moved. Nonetheless, pursuant to Ohio's Supplemental Process, those voters will be sent a Confirmation Notice.

Of the voting-eligible population, registration rates during presidential election years hover slightly over 70%, while rates during midterm election years hover five percentage points lower, at approximately 65%.[9] This nationwide data—which reveals a five percent ebb and flow of registration rates—suggests that registration lists *are* being culled throughout the United States without the need for Ohio's Supplemental Process.

Like registration rates, voting rates amongst the voting-eligible population fluctuate from higher in presidential election years, consistently above 60%, to significantly lower in midterm election years, between 40 and 45%. *Id.* Focusing on the registered voters is telling: In presidential election years, between 85 and 90% of registered voters cast a ballot. However, in midterm election years, only between 65 and 70% of registered voters turned out. This is a 20% drop in voting during midterm elections.

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[9] U.S. Census Bureau, Table A-1. Reported Voting and Registration by Race, Hispanic Origin, Sex, and Age Groups: November 1964 to 2016 (NOTE: Voting rates corrected February 2012), https://goo.gl/bcLjS9 ("Voter Registration and Turnout").

Table 2. National Voter Registration and Turnout[10]

	2016	2014	2012	2010	2008
Voted	61.4%	41.9%	61.8%	45.5%	63.6%
Registered	70.3%	64.6%	71.2%	65.1%	71.0%
Percent Voted of Registered	87.3%	64.9%	86.8%	69.9%	89.6%
Percent Registered But Did Not Vote	12.7%	35.1%	13.2%	30.1%	10.4%

This national trend plays out in Ohio, where voter turnout for presidential elections is at least 20% higher than voter turnout for midterm elections.

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[10] *Id.*

Table 3. Ohio Voter Registration and Turnout[11]

	2016	2014	2012	2010	2008
Voted	63.6%	39.7%	63.1%	45.2%	65.5%
Registered	72.1%	66.5%	71.1%	66.1%	73.0%
Percent Voted of Registered	88.2%	59.7%	88.7%	68.4%	89.7%
Percent Registered But Did Not Vote	11.8%	40.3%	11.3%	31.6%	10.3%

[11] U.S. Census Bureau, Table A-3a. Reported Voting and Registration for Total and Citizen Voting-age Population by State: Congressional Elections 1974 to 2014, https://goo.gl/NL8w8z (voted); U.S. Census Bureau, Table A-5a. Reported Voting for Total and Citizen Voting-age Population by State: Presidential Elections 1972 to 2016, https://goo.gl/NL8w8z (voted); U.S. Census Bureau, Table A-3b. Reported Voting and Registration for Total and Citizen Voting-age Population by State: Congressional Elections 1974 to 2014, https://goo.gl/NL8w8z (registered); U.S. Census Bureau, Table A-5b. Reported Voting for Total and Citizen Voting-age Population by State: Presidential Elections 1972 to 2016, https://goo.gl/NL8w8z (registered).

Respondents' brief cites to voter turnout data published by the Ohio Secretary of State. Resp. Br. at 31 & n.15. In this brief, *amici* rely on data from the U.S. Census Bureau. While *amici* acknowledge some differences between the Ohio Secretary of State's data and that from the U.S. Census Bureau, the U.S. Census Bureau data provides more detail, *i.e.*, breakdown by race and allows for a direct comparison of Ohio trends to national trends. While the precise figures may be different in the two datasets, this does not change the arguments made herein.

The 20% fluctuation is not caused by 20% of registered voters moving after each presidential election and failing to cancel their outdated registrations. In fact, as discussed *supra* Section I.A, a change in residence is rarely, if ever, reported as the reason for non-voting. Consequently, when the Supplemental Process is initiated based on failure to vote in a midterm election—for example, after the 2014 election in which more than 40% of Ohio's registered voters did not vote—the Supplemental Process is *guaranteed* to capture *tens of thousands* of people for whom there is absolutely no reason to believe they have moved.

And because voter registration and turnout rates in Asian American and Latino communities are lower than national and Ohio rates, the impact of Ohio's Supplemental Process is magnified for these communities. Nationwide, Asian Americans and Latinos register to vote at rates 13-16% lower than the general population.

Table 4. National Voter Registration by Race[12]

	2016	2014	2012	2010	2008
Total Registered	70.3%	64.6%	71.2%	65.1%	71.0%
Asian American	56.3%	48.8%	56.3%	49.3%	55.3%
Latino	57.3%	51.3%	58.7%	51.6%	59.4%

In Ohio, voter registration data shows that Asian American and Latino communities are registered at lower rates than the general population.

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[12] Voter Registration and Turnout, *supra* note 9.

Table 5. Ohio Voter Registration by Race[13]

	2016	2014	2012	2010	2008
Total Registered	72.1%	66.5%	71.1%	66.1%	73.0%
Asian American	53.1%	60.3%	--[14]	48.8%	52.2%
Latino	68.9%	58.9%	67.0%	49.7%	59.8%

Voter turnout rates, unsurprisingly, follow suit at rates 12-16% lower for Asian Americans and Latinos than for the general public.

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[13] U.S. Census Bureau, Table 4b. Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2016, https://goo.gl/KJnvTv; U.S. Census Bureau, Table 4b. Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2014, https://goo.gl/M3p2RN; U.S. Census Bureau, Table 4b. Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2012, https://goo.gl/9Xrxzg; U.S. Census Bureau, Table 4b. Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2010, https://goo.gl/3oqiUR; U.S. Census Bureau, Table 4b. Reported Voting and Registration of the Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2008, https://goo.gl/zyJ1jE.

[14] The U.S. Census Bureau's sample size was too small to calculate this figure. *Id.*

Table 6. National Voter Turnout by Race[15]

	2016	2014	2012	2010	2008
Total Turnout	61.4%	41.9%	61.8%	45.5%	63.6%
Asian American	49.0%	27.1%	47.3%	30.8%	47.6%
Latino	47.6%	27.0%	48.0%	31.2%	49.9%

Ohio's voter turnout data similarly shows gaps between Asian American and Latino turnout rates compared to the general population. In Ohio, the Asian American turnout rate trended 16-18% lower in presidential election years and closer in midterm election years, while the Latino turnout rate was 6-13% lower in presidential election years and about 16% lower in midterm election years.

Table 7. Ohio Voter Turnout by Race[16]

	2016	2014	2012	2010	2008
Total Turnout	63.6%	39.7%	63.1%	45.2%	65.5%
Asian American	46.8%	38.1%	--[17]	38.5%	46.9%
Latino	57.8%	23.1%	56.9%	29.3%	52.4%

With these lower turnout rates, Asian American and Latino registrants are more likely to be subject to the Supplemental Process. And, as discussed *infra*, barriers to language access make it difficult for

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[15] Voter Registration and Turnout, *supra* note 9.

[16] *Id.*

[17] The U.S. Census Bureau's sample size was too small to calculate this figure. *Id.*

many Asian Americans and Latinos to extricate themselves from the Supplemental Process.

II. OHIO'S SUPPLEMENTAL PROCESS POSES A SIGNIFICANT RISK TO LATINO AND ASIAN AMERICAN POPULATIONS WHO OFTEN ENCOUNTER ADDITIONAL HURDLES IN ACCESSING THE BALLOT

Individuals are less likely to register and vote when they are faced with additional barriers to reading and understanding election-related materials because, in Ohio and many other parts of the United States, they are generally provided in English only and not in the person's native language. *See, e.g.*, 52 U.S.C. § 10503(a). This presents challenges to prospective Asian American and Latino voters that are compounded by the Supplemental Process when these voters are ultimately purged for not voting and not returning an English-only Confirmation Notice.

A. English-Only Election-Related Materials Are Barriers to Registration and Voting

Language access, or the ability to read or comprehend election-related materials in a person's native tongue, is an issue of concern for Latino and Asian American communities. A significant portion of the U.S. population—and its fastest growing segment—is comprised of Latinos and Asian Americans for whom English is not their first language and who may not be fluent in English. Of

approximately 291 million people in the United States over the age of five, 60 million people, or just over 20%, speak a language other than English at home.[18] Among those other languages, the top two categories are Spanish and Asian languages,[19] at 37 million and 11.8 million people, respectively.[20] Within these populations, individuals have varying levels of English proficiency. Those who do not speak English at home and who speak English "less than very well" are considered to have limited English proficiency (LEP), as defined by the U.S. Census Bureau.[21] In the United States, 35% of the Asian alone[22] and Latino populations are LEP.[23]

Ohio's LEP rates for speakers of Asian languages and Spanish are a few percentage points higher than the national average.

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[18] U.S. Census Bureau, Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for United States: 2009-2013, https://goo.gl/sAq5qa (released Oct. 2015) ("Languages Spoken at Home").

[19] "Asian languages" captures the following U.S. Census Bureau categories: Asian and Pacific Island Languages, Hindi, Gujarati, Urdu, and Other Indic Languages. It excludes Armenian and Persian.

[20] Languages Spoken at Home, *supra* note 18.

[21] Camille Ryan, "Language Use in the United States: 2011," 4 (Washington: Bureau of the Census, 2012), https://goo.gl/rSbrgQ.

[22] "Asian alone" means Asian not in combination with any other racial categories designated in the U.S. Census.

[23] Center for American Progress, Language Diversity and English Proficiency, Fig. 3.2 (May 27, 2014), https://goo.gl/wCY87c.

Table 8. Asian American and Latino LEP Populations in Ohio[24]

	No. of Speakers	Speak English Less Than "Very Well"	LEP
Asian languages	162,682	62,958	38.7%
Spanish	241,651	90,725	37.5%

Moreover, in Ohio's more densely populated areas, LEP rates are often higher than both national (35%) and statewide (38%) rates.[25] LEP rates for Asian language speakers range from 38.1% to 48.7%, and LEP rates for Spanish speakers range from 31.2% to 44.2%.[26]

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[24] Languages Spoken at Home, *supra* note 18.

[25] *Id.*

[26] U.S. Census Bureau, Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for Core-Based Statistical Areas (CBSAs): 2009-2013, https://goo.gl/nJVdUU.

Table 9. Urban Ohio Asian Language LEP Population[27]

City	No. of Speakers	Speak English Less Than "Very Well"	LEP
Akron	12,797	6,230	48.7%
Cincinnati	33,628	12,825	38.1%
Cleveland	33,975	13,083	38.5%
Columbus	48,642	18,672	38.4%
Dayton	13,796	5,418	39.3%

Table 10. Urban Ohio Spanish Speaking LEP Population[28]

City	No. of Speakers	Speak English Less Than "Very Well"	LEP
Akron	8,060	2,514	31.2%
Cincinnati	45,662	18,935	41.5%
Cleveland	64,269	22,120	34.4%
Columbus	50,519	22,337	44.2%
Dayton	13,060	5,114	39.2%

These rates indicate a high population of Asian American and Latino LEP individuals who may have difficulty understanding English-only election materials. According to the most recent U.S. Census Bureau estimates, Ohio has 26,165 Spanish-speaking LEP voter-eligible citizens and 24,841 Asian language speaking LEP voter-eligible citizens.[29]

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[27] *Id.*

[28] *Id.*

[29] U.S. Census Bureau, Voting Rights Determination File, https://goo.gl/YTWafb (select "Public Use Data File and

These voters are reliant on assistance from fluent English-speaking family members or other third parties to navigate the electoral process, including the additional burden of interpretation of an English-only Confirmation Notice sent as part of Ohio's Supplemental Process.

Having recognized the challenges posed by language access issues, Congress enacted several laws to protect the voting rights of language minorities. *First,* Congress recognized language access issues that affected citizens who were educated in Spanish in Puerto Rico. Congress found that, "through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process." 52 U.S.C. § 10503(a). Congress enacted Section 4(e) as part of the 1965 Voting Rights Act (VRA), 52 U.S.C. § 10303(e), which requires states to provide LEP Spanish-speaking Puerto Rican voters with voting materials and voting assistance in Spanish. *Second,* ten years later, Congress enacted Section 203 in recognition that certain minority citizens, due to limited English speaking ability, experienced historical discrimination and disenfranchisement. Congress documented a "systematic pattern of voting discrimination and exclusion against minority group citizens who are from environments in which the dominant language is other than English," and an "extensive evidentiary record demonstrating the

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Technical Documentation"; then open "sect203_All_Areas.csv" and see Col. R (VACLEP) (Voter-Age Citizens LEP)).

prevalence of voting discrimination and high illiteracy rates among language minorities." H.R. Rep. No. 94-196, at 16 (1975). Section 203 requires jurisdictions with a threshold LEP population to provide election-related materials in a native language for "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage." 52 U.S.C. § 10503(e). *Third*, seven years after enacting Section 203, Congress recognized the need to provide assistance at the polls for "blind, disabled, or illiterate" voters. S. Rep. No. 97-417, at 2 (1982). Congress found that citizens who either do not have written language abilities or who are unable to read or write English proficiently were more susceptible to having their votes unduly influenced or manipulated and were more likely to be discriminated against at the polls. *Id.* at 62. Congress thus enacted Section 208 of the VRA to provide voters with the right to have someone assist them in the voting process. 52 U.S.C. § 10508.

Unless a jurisdiction is subject to Sections 203 or 4(e), it is not federally required to provide voters and prospective voters with election-related materials in any language other than English.[30] Voters in such jurisdictions[31] are reliant upon Section 208 of the

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[30] Center for American Progress, Language Diversity and English Proficiency, at 4 (May 27, 2014), https://goo.gl/wCY87c (defining linguistically isolated a household without at least one 14 year-old who speaks English exclusively or "very well.").

[31] *See* Voting Rights Act Amendments of 2006, Determinations Under Section 203, 81 Fed. Reg. 87,532 (Dec. 5, 2016). No jurisdictions in Ohio are covered by Section 203. Cuyahoga and Lorain Counties remain the only counties in Ohio which have been subject to settlement agreements with the Department of

VRA. Section 208, however, is not a failsafe. Some voters are considered linguistically isolated, when they do not have a non-LEP member in the household. Nationwide, 21% of Latino households and 20% of Asian alone households are linguistically isolated.[32] These eligible voters do not have family assistance readily available to explain election-related mailings or assist at the polls.[33] Assuming these linguistically-isolated individuals have overcome language obstacles and registered to vote, if no assistance is available to them at the polls (either because no poll worker speaks their language or because they cannot bring someone with them), they may be unable to navigate the system and end up subject to the Supplemental Process, or worse, purged from the voter rolls because they were unable to vote for the NVRA-mandated two election cycles or communicate with officials that they had not moved. This problem, which discourages voter participation, is correctable, as, when in-language materials are

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Justice under Section 4(e) that require them to provide election-related information and materials in Spanish. *See infra* discussion Section II.B.

[32] *Id.* at Table 3.2.

[33] A person born in the United States has no English language requirement, and, while a person must be able to read and write English to become a U.S. citizen, the requirements for the reading and writing portions of the naturalization test are minimal. *See* U.S. Citizenship and Immigration Services, Reading Vocabulary for the Naturalization Test, https://goo.gl/d8cSF1 (64 words or phrases); U.S. Citizenship and Immigration Services, Writing Vocabulary for the Naturalization Test, https://goo.gl/2D4aFM (75 words or phrases).

provided to prospective voters, voter registration and turnout increases significantly.[34]

B. Ohio Policies Serve as a Barrier to Registration and Voting

Ohio's Supplemental Process is just one of a slate of policies on voter registration and voting that have impeded the ability of otherwise eligible Latino and Asian American voters to register and cast a ballot.

As explained *supra*, Congress enacted Section 4(e) to provide LEP Spanish-speaking Puerto Rican voters materials and assistance in Spanish.[35] Since 2010, the Department of Justice filed two lawsuits against Ohio counties for violating Section 4(e): Cuyahoga County (where Cleveland is located) in

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[34] For example, after the Department of Justice filed a Section 203 lawsuit in San Diego County, California, voter registration among Latinos and Filipinos rose by over 20 percent and Vietnamese registrations increased by 40 percent. *See* Alberto R. Gonzales, Prepared Remarks of Attorney General Alberto R. Gonzales at the Anniversary of the Voting Rights Act, The United States Dep't of Justice (Aug. 2, 2005), https://goo.gl/ynr5ML. And in Harris County, Texas, the turnout among Vietnamese eligible voters doubled following the Department of Justice's efforts at enforcing Section 203. *See id.*

[35] According to the 2015 American Community Survey 1-Year Estimates, Ohio has 411,202 Latinos, with 122,908 of Puerto Rican origin and, of those, 39,198 were born in Puerto Rico. U.S. Census Bureau, American Fact Finder, Hispanic or Latino Origin by Specific Origin , 2015 American Community Survey 1-Year Estimates, https://goo.gl/z6A91W; U.S. Census Bureau, American Fact Finder, Place of Birth by Nativity, 2015 American Community Survey 1-Year Estimates, https://goo.gl/PZp14F.

2010 and Lorain County in 2011.[36] Both cases resulted in settlement agreements, whereby the boards of elections promised to undertake measures that included disseminating bilingual election-related materials and providing bilingual speakers to assist at the polls.[37] A few years after the Cuyahoga County case was settled, the Department of Justice deployed federal observers to monitor precincts in the county and discovered several violations of the settlement agreement, including the translation of materials into a dialect of Spanish that was not fully accessible to Puerto Ricans.[38] The failure to provide Spanish materials for Puerto Rican Americans voting in Ohio elections impedes their ability to vote.

Another issue that reduces voter turnout is voters' inability to go to the polls, which is exacerbated when a state constrains the options it offers voters. Minority voters, particularly Latino

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[36] Complaint, *United States v. Cuyahoga County Board of Elections*, Case No. 1:10-cv-01949 (N.D. Ohio Sept. 1, 2010) ECF 1, https://goo.gl/RQp5ui; Complaint, *United States v. Lorain County*, Case No. 1:11-cv-02122 (N.D. Ohio Oct. 7, 2011) ECF 1, https://goo.gl/NhEgvp.

[37] Agreement, Judgment and Order, *United States v. Cuyahoga County Board of Elections*, Case No. 1:10-cv-01949 (N.D. Ohio Sept. 3, 2010) ECF 4, https://goo.gl/78jxre; Memorandum of Agreement Between the United States of America and Lorain County, Ohio Regarding Compliance with Section 4(e) of the Voting Rights Act, *United States v. Lorain County*, Case No. 1:11-cv-02122 (N.D. Ohio Oct. 7, 2011) ECF 5, https://goo.gl/sGe1SY.

[38] Letter from Dep't of Justice to Cuyahoga County, *United States v. Cuyahoga County Board of Elections*, Case No. 1:10-cv-01949 (N.D. Ohio Jan. 10, 2014) ECF 22-1.

workers, often have less flexibility in working hours[39] and face more obstacles to obtaining time off from work to go to the polls. And, even when able to take off from work, a majority of Latino workers are hourly wage earners who may lose pay for those hours.[40] This can be significant to voters in states like Ohio, which has a history of long lines, some requiring voters to wait as long as nine hours before casting a ballot, with an average wait time of two to three hours.[41] In fact, the Supplemental Process tends to contribute to these lines because voters subject to the Supplemental Process are moved to "inactive" status on the voter rolls and are not factored in for precinct allocations. Ohio Rev. Code Ann. § 3501.18(A).

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[39] Data from the last time the U.S. Census Bureau surveyed the population regarding work schedules and flexibility in 2004 revealed that, while 30.9% of white wage and salary workers have flexible schedules, only 20.7% of Latino workers have flexible schedules. *See* Terence M. McMenamin, *A time to work: recent trends in shift work and flexible schedules*, Monthly Labor Review 8 (Dec. 2007), https://goo.gl/g1aPsR.

[40] In 2016, 71.9% of all workers in the United States were paid hourly wages, and, among Latinos, this number was 85.7%—approximately 15% higher. U.S. Dep't of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, Household Data, Annual Averages, Table 37, https://goo.gl/Y4vqnw (111,091,000 workers in the United States, 18,950,000 of which were Latino); U.S. Dep't of Labor, Bureau of Labor Statistics, BLS Reports, Characteristics of minimum wage workers, 2016, Table 1 (Apr. 2017), https://goo.gl/HyqTRx (79,883,000 hourly workers in the United States, 16,241,000 of which were Latino).

[41] Adam Liptak, Voting Problems in Ohio Set Off an Alarm, The New York Times (Nov. 7, 2004), https://goo.gl/NaqKyf.

Nonetheless, states have the ability to adopt measures that make it easier for voters by offering early voting options. While Ohio offers some early voting options, Ohio eliminated Golden Week, during which voters could register and vote on the same day. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623, 650 (6th Cir. 2016), *stay denied* 137 S. Ct. 28 (2016). Given Ohio's Supplemental Process that purges otherwise eligible voters, Golden Week was the most convenient way for a voter to cast a ballot and simultaneously straighten out any registration issues. For example, if voters were to show up during Golden Week and learn that they had been purged from the polls, they would be able to re-register on-the-spot and cast a ballot without incident. But Ohio eliminated Golden Week, leaving voters without the ability to correct any registration issues during early voting.[42]

Ohio has engaged in another tactic that has had long-term reverberations in the Asian American and Latino communities. In 2006, Ohio enacted legislation that allowed poll workers to inquire whether voters were naturalized citizens and, if so, to require such voters to present proof of naturalization; or, if these voters did not have proof of citizenship on them, they were permitted to cast a provisional ballot that was only counted if they submitted proof to the Board of Elections within 10 days. The law was struck down because it

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[42] *Ohio Democratic Party*, 834 F.3d at 646-47 (6th Cir. 2016) (Stranch, J., dissenting) (finding that the elimination of Golden Week disparately impacted African Americans' right to vote in violation of equal protection).

discriminated based on national origin, burdened naturalized citizens' fundamental right to vote, and constituted a poll tax for people who had to request a costly replacement certificate of naturalization. *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 825-27 (N.D. Ohio 2006). Despite its unconstitutionality, the statute remains on the books and even underwent minor amendments in 2012. Ohio Rev. Code Ann. § 3505.20(A).

In the shadow of this historical context, Ohio implements the Supplemental Process, which targets registrants for removal for non-voting. The resulting problems are compounded by the additional barriers imposed by Ohio that depress voter turnout among Asian Americans and Latinos and purge higher rates of individuals from these communities.

III. OHIO'S SUPPLEMENTAL PROCESS UNLAWFULLY REMOVES REGISTERED VOTERS FOR NOT VOTING

Ohio's Supplemental Process conflates non-voting with moving, and, as such, uses non-voting as a trigger for removal. Ohio claims that the Supplemental Process was instituted to capture the purportedly high numbers of registrants who fail to update their address with USPS. Pet. Br. at 10. In reality, the Supplemental Process is an overly-broad solution to a relatively minor problem that removes large numbers of voters, particularly Asian Americans and Latinos, for not voting, a result that Congress explicitly prohibited, 52 U.S.C. § 20507(b)(2).

A. Data Shows that Ohio's Supplemental Process Is Unwarranted and Unnecessary

At the outset, Petitioner and *amici* in support of Petitioner concede that a majority of people who move *do* submit change of address (COA) forms. *See* Pet. Br. at 56; United States Br. at 33; Former Attorneys Br. at 16; Landmark Legal Foundation Br. at 7; Buckeye Institute Br. at 9 (incorrectly claiming that 40% of people who move fail to submit a COA form).[43] Nevertheless, Petitioner and *amici* suggest that a large portion of people who move fail to notify the Postal Service, thereby justifying the use of the Supplemental Process. Pet. Br. at 56; *see also, e.g.*, Buckeye Institute Br. at 9-10, Georgia Br. at 2. The statistics relied upon, however, do not support the assertion. The only data upon which Petitioner and *amici* rely is a USPS report citing a 2006 study that

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[43] The correct figures are far from the 40% figure that Petitioner and *amici* in support of Petitioner repeatedly invoke as justifying the Supplemental Process. *See* Pet. Br. at 56; Buckeye Institute Br. at 9-10, Georgia Br. at 2. The Buckeye Institute makes several critical errors in applying the 40% figure in running its calculations, Buckeye Institute Br. at 9-10: (1) As explained *infra*, the 40% figure is not solely attributable to a person's failure to notify USPS of a COA. (2) Even if the 40% figure were accurate, it would apply to the population as a whole. The Buckeye Institute based its calculation on households, and failed to make a reduction based on citizens of voting age, those actually registered, and the percentage of those registrants who abstained from the election. The Buckeye Institute's resulting apples-to-oranges comparison of households to the margin of the 2012 presidential election is, thus, grossly misleading.

found that "about 40 percent of [undeliverable as addressed (UAA)] mail is caused by the public, *primarily* because customers do not notify the Postal Service of address changes."[44] The report breaks down the approximately 40% (39.5% to be exact) of UAA mail further, identifying several categories captured by that figure as not attributable to failure to file a COA: no mail receptacle, requires in-care-of box/add info, customer refused, COA incorrectly filed, deceased, and snowbird - temporary move. *Id.* at 13. These inapplicable and irrelevant categories account for 24.2% of the 39.5% UAA mail. Thus, the percent of UAA mail must be reduced so as not to include these irrelevant reasons. Reducing 39.5% UAA mail by 24.2% (39.5%*(100%-24.2%)) results in 29.9% of UAA mail as potentially attributable to failure to notify USPS of a COA.

Next, it is important to note that UAA mail accounts for only 4.3% of *all* mail, *id.* at 1, so this figure, in turn, must be further refined to the percentage attributable to failure to notify USPS of a COA, or 1.3% (29.9% of 4.3%). This number (1.3%) reveals that the Supplemental Process was instituted to capture a tiny fraction of the population.

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[44] United States Postal Service Office of the Inspector General, Strategies for Reducing Undeliverable as Addressed Mail, Report No. MS-MA-15-006 at 1 (May 1, 2015), https://goo.gl/zsr5r8 (emphasis added).

B. Ohio Purge Data Reveals that the Supplemental Process Targets Hundreds of Thousands of Voters Simply Because They Have Not Voted

The Supplemental Process does not target the small number of unreported people who have moved. Instead, the Supplemental Process casts a much wider net and purges many more people—hundreds of thousands of people[45]—the overwhelming majority of whom have not moved. This misalignment and over-purging is apparent in several key ways.

First, as Petitioner concedes, a majority of people who move do submit a COA to USPS. *See* Pet. Br. at 56; *see also* United States Br. at 33; Former Attorneys Br. at 16; Landmark Legal Foundation Br. at 7; Buckeye Institute Br. at 9. Consequently, one would expect there to be more purges pursuant to the NCOA purge than those pursuant to the Supplemental Process. The available data[46] from four of Ohio's 88 counties, however, shows the exact opposite trend:

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[45] Plaintiffs' Motion for Summary Judgment and Permanent Injunction, *Ohio A. Philip Randolph Inst. v. Husted*, Case No. 2:16-cv-303 (S.D. Ohio filed May 24, 2016), ECF 39, at 20.

[46] Although they have an obligation to maintain accurate records of the purge of registered voters pursuant to the Supplemental Process, many counties in Ohio have not done so. *See, e.g.*, Jessie Balmert, *How many were removed from Ohio's voter rolls? It's a mess*, Cincinnati.com (Sept. 22, 2016), https://goo.gl/fvBhUs. As a result, comprehensive data on the full impact of the Supplemental Process on Ohio voters is unavailable.

Table 11. People Purged by County Pursuant to NCOA or Supplemental Process in 2015[47]

County	NCOA Purge	Supplemental Process Purge
Cuyahoga	10,596	40,627
Green	3,600	21,616
Hamilton	2,118	6,895
Medina	517	767

The overwhelming majority of Ohio's purges are made under the Supplemental Process. In fact, this is the primary way Ohio strikes voters from the rolls, at a rate *three times* that of the NCOA process.[48]

Second, data from the 2016 presidential election shows that thousands of voters, who had been purged under the Supplemental Process for not having voted for many years leading up to the election, came to the polls to vote; these voters had in fact ***not*** moved outside of their polling jurisdiction:

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[47] Plaintiffs' Motion for Summary Judgment and Permanent Injunction, *Ohio A. Philip Randolph Inst. v. Husted*, Case No. 2:16-cv-303 (S.D. Ohio filed May 24, 2016), ECF 39, at 17.

Amici note that 69,905 voters were purged by the Supplemental Process in four of Ohio's 88 counties; thus, it can be expected that when the other 84 counties are included, the total purged in 2015 by the Supplemental Process numbers in the hundreds of thousands.

[48] Brief of Appellants, *Ohio A. Philip Randolph Inst. v. Husted*, Case No. 16-3746 (6th Cir. filed July 13, 2016), ECF 24, at 9.

Table 12. Ohio Purged Voters Who Attempted to Vote in 2016[49]

Year	No. Purged Who Tried to Vote in 2016	Years of Non-Voting	Years Within Polling Jurisdiction
2011	902	At least 11 years	At least 11 years
2013	1,128	At least 9 years	At least 9 years
2015	5,485	At least 7 years	At least 7 years

Each person captured in Table 12 is someone who was unjustifiably purged from Ohio's voter rolls, as they had not moved outside their polling jurisdiction and their voter registration was current. The only logical conclusion is that Ohio is engaging in a systematic process of purging people for not voting.

Consequently, populations who do not vote are the most impacted by Ohio's Supplemental Process. Given the additional hurdles they face in voting, described *supra*, it is not surprising that Ohio's Latino and Asian American communities vote at lower rates than others and are greatly impacted by Ohio's Supplemental Process. In fact, Ohio voter data reveals that the percentages of Asian American and Latino registered voters who did not vote in the two-year period of 2014 and 2015 are the highest of

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[49] Ohio Sec'y of State, Provisional Supplemental Report for Nov. 2016 Election, https://goo.gl/9CwGZG.

all major groups in Ohio—69.6% and 68.2%, respectively.

Table 13. Ohio Voters by Race in 2014 and 2015[50]

	Active[51] Voter	Dropped[52] Voter	Total Voter
Asian American	8,101	1,523	9,624
Black	264,337	17,867	282,204
Caucasian	3,499,909	282,665	3,782,574
Latino	20,493	2,070	22,563
Unknown	12,215	910	13,125

[50] Catalist, LLC, Race Data Estimate and Ohio Voter File, July 5, 2017 (subscription database accessed Sept. 18, 2017) (search terms: state (Ohio), registered date (null to Dec. 31, 2015), voted in at least one election between Jan. 2014 and Dec. 2015, and did not vote in any election between Jan. 2014 and Dec. 2015) ("Catalist Data").

[51] "Active" means that the individual is on Ohio's voter registration list today and covers both active and "inactive" voters in Ohio. Catalist maintains current data, meaning it provides a snapshot of the current Ohio registration list with historical data about whether a voter participated in past elections.

[52] "Dropped" means that the individual is not on Ohio's voter registration list today. A dropped voter who voted in 2014/2015 had to be active at the time to cast a ballot.

Table 14. Ohio Non-Voters by Race in 2014 and 2015[53]

	Active Non-Voter	Dropped Non-Voter[54]	Total Non-Voter
Asian American	14,633	7,396	22,029
Black	309,952	167,449	477,401
Caucasian	1,829,813	1,551,877	3,381,690
Latino	31,463	16,929	48,392
Unknown	15,097	8,840	23,937

Table 15. Percent of Ohio Voters by Race in 2014 and 2015[55]

	% Voted of Registered	% Did Not Vote
Asian American	30.40%	69.60%
Black	37.15%	62.85%
Caucasian	52.80%	47.20%
Latino	31.80%	68.20%
Unknown	35.41%	64.59%

[53] Catalist Data, *supra* note 50.

[54] From the Catalist data, it cannot be determined whether a dropped non-voter was on the registration list in the 2014/2015 timeframe or whether that voter had already been removed from the registration list prior to 2014/2015. Given that this determination is not possible, dropped non-voters are included in the calculations in this section, resulting in more conservative figures of the impact on Asian Americans and Latinos.

[55] Catalist Data, *supra* note 50.

This means that, after a given election, Asian Americans and Latinos are more likely to be subject to the Supplemental Process and relegated to "inactive" status by Ohio than any other racial group. Consequently, Ohio's pattern of over-purging voters who have not moved and for whom Ohio has no reason to believe have moved has a particularly pernicious and adverse effect on these communities.

IV. THE CONFIRMATION NOTICE AND NEED TO RE-REGISTER DO NOT CURE THE HARMS CAUSED BY OHIO'S SUPPLEMENTAL PROCESS

Sending a Confirmation Notice to a registered voter who has not voted in the past two years, in accordance with the Supplemental Process, does not halt the removal of people who have not moved. The process is only guaranteed to halt if a person returns the Confirmation Notice or votes in the next four years. However, as discussed *supra*, non-voting is commonplace among *all* Americans, particularly during midterm elections and, in particular, among Asian Americans and Latinos who also face additional hurdles accessing the ballot box. Consequently, it is unreasonable to place an additional unnecessary burden on these otherwise properly registered voters to extricate themselves from the Supplemental Process by either returning an English-only Confirmation Notice or by voting. Moreover, after a person who has not moved has been purged, that person must re-register in order to cast a ballot, which is in direct contradiction to Congress's intent in promoting voter registration list

maintenance. Finally, once voters have been purged for not voting, they are not informed of their removal from the lists, so when they *do* attempt to vote, they will not be permitted to cast a ballot. This is precisely the disenfranchisement that Congress sought to avoid.

A. The Confirmation Notice Is Insufficient to Guard Against Removal of Individuals Who Have Not Moved

Petitioner claims that simply sending a Confirmation Notice halts the chain of causation connecting removal to the person's failure to vote. Pet. Br. at 23-29. But, given how few election mailings are returned, there is no factual support for this assertion. While Ohio's Supplemental Process data is incomplete,[56] other states have required registrants to respond to election-related mailings and the data from those efforts is instructive. For example, in June 2017, the Wisconsin Elections Commission mailed approximately 380,000 Notices of Suspension to voters, and only 28,169 people—less than 8%—returned the postcard.[57] And, in Oregon, the Oregon Elections Division sent registration-related mailings to 304,227 people who had recently submitted paperwork with a current address to the Office of Motor Vehicles, and only 57,542—less than

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[56] *See supra* note 46.

[57] Barron News-Shield, 350,000 voter registrations deactivated (Aug. 23, 2017), https://goo.gl/8FyzfA.

20%—returned the card.[58] Where people do not return a Confirmation Notice, as can be expected of approximately 80% of people who receive such notices, Ohio will ultimately purge these eligible voters *for whom there is no evidence that they have moved.* And, where there is ample evidence showing the barriers to voting and low turnout in Asian American and Latino communities, these voters will be disproportionately affected. Ironically, Ohio is trying to circumvent the ban on removing voters for non-voting by requiring people to vote at least once every six years, while, at the same time, making voting more difficult and challenging.

Purging people who have not moved and are otherwise eligible to vote is unacceptable and unlawful. *See* 52 U.S.C. § 20507(a)(3), (a)(4). Individuals who have registered at the address where they reside have every right to believe their registration is current. People should not have to worry about whether Ohio has decided to purge their registration because they were unable to vote in several elections. And, as discussed *infra*, Congress desired this result. Consequently, such people have no reason to expect a requirement of responding to a Confirmation Notice or risk being purged.

In addition to these generally applicable problems with the Supplemental Process, there are additional issues that directly impact Asian American and

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[58] Rob Griffin, Who Votes with Automatic Voter Registration? Impact Analysis of Oregon's First-in-the-Nation Program, Center for American Progress (June 7, 2017), https://goo.gl/1z5xAD.

Latino populations, the communities that are affected by the Supplemental Process at higher percentages than any other. *See supra* Section II. The State of Ohio provides an English-only Confirmation Notice.[59] As explained *supra*, however, Ohio has a greater percentage of LEP Asian American and Latino populations than national rates, of which 20% are linguistically isolated.[60] In such households, there is no one to translate the Confirmation Notice. As a result, Asian American and Latino households have even more reasons than other registrants for not responding to Confirmation Notices that the overwhelming majority of *all* registrants tend not to return.

And when Ohio sends a Confirmation Notice, the person targeted is relegated to "inactive" status. Ohio ignores voters in the "inactive" category and excludes them from consideration in many election administration efforts: Ohio does not send an "inactive" voter certain election-related materials, including the invitation it sends to each of its "active" voters to vote via absentee ballot.[61] Preparations for Election Day similarly exclude "inactive" voters, as they are not accounted for in the allocation of voters

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[59] As noted *supra*, Ohio does not have any Section 203 covered jurisdictions that require it to translate election-related mailings. Cuyahoga and Lorain Counties remain the only Ohio counties that have been subject to Section 4(e) translation requirements. *See supra* discussion Section II.B.

[60] *See supra* note 32.

[61] Doug Livingston, 1 in 7 Ohio registered voters won't receive an invitation to vote absentee, Akron Beacon Journal (Sept. 12, 2016), https://goo.gl/L3QLTX.

to specific precincts or polling locations, Ohio Rev. Code Ann. § 3501.18(A), or for the printing of ballots, *id.* § 3505.11(A). Treating people who have not voted in two years as "inactive" and withholding crucial election-related mailings from them is likely to reduce their probability of voting in subsequent elections.[62]

B. Re-Registration Contradicts Congress's Explicit Goal in Enacting the NVRA

"[A]n underlying purpose of the Act [is] that once registered, a voter should remain on the list of voters so long as the individual remains eligible to vote in that jurisdiction." H.R. Rep. No. 103-9 at 18 (1993) (House Report); *see also* S. Rep. No. 103-6 at 19 (1993) (Senate Report). Congress's goal was "to avoid requiring voters to re-register unnecessarily." Br. of the United States at 3 (citing Senate Report at 2). At that time, many states employed a practice of purging registered voters who had not exercised their right to vote. Congress disagreed with that practice, and, through the NVRA, "made clear that State programs to remove ineligible registrants may

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[62] Research shows that contacting potential voters, including those who campaigns typically disregard, results in increased voter turnout amongst those constituencies. *See, e.g.*, Nonprofit VOTE, Engaging New Voters: The Impact of Nonprofit Voter Outreach on Client and Community Turnout 7, 10 (Dec. 2015), https://goo.gl/fAAzJF (contact resulted in 15% higher turnout rates for Latinos and 46% higher turnout for Asian Americans and, amongst voters who campaigns typically disregard, turnout doubled).

not presume that registrants have become ineligible solely because they have failed to vote." *Id.* at 15. Congress forbade removing eligible voters "from the rolls 'merely for exercising their right not to vote.'" *Id.* at 5 (citing Senate Report at 17).

Not only did Congress conclude that non-voting did not merit a presumption of ineligibility to vote, but Congress also understood the risks and costs associated with such improper voter purging. The Senate Report explains: "[P]urging for non-voting tends to be highly inefficient and costly. It not only requires eligible citizens to re-register when they have chosen not to exercise their vote, but it also unnecessarily places additional burdens on the registration system because persons who are legitimately registered must be processed all over again." Senate Report at 18. Congress also understood that purging for non-voting would disproportionately affect the poor, minorities, and people who are illiterate in English. *Id.* The Senate Report admonished: "These processes [of voter roll maintenance] must be scrutinized to prevent poor and illiterate voters from being caught in a purge system which will require them to needlessly re-register." *Id.*

The Federal Election Commission (FEC) issued guidance on implementing the NVRA and concluded that targeting non-voters with confirmation notices disproportionately affects minorities, low-income voters, and those with language access issues.[63] The

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[63] Federal Election Commission, Implementing the NVRA of 1993: Requirements, Issues, Approaches, and Examples (Jan. 1, 1994), https://goo.gl/cAMaQu.

FEC observed that "many [people] are not likely to respond [to a confirmation notice] in writing," so a failure to respond cannot support the assumption that a person has moved. *Id.* at 5-21. People who cannot read English or live in linguistically isolated households, for example, will be unable to respond to an English-only Confirmation Notice. As a result, and as the FEC predicted, the process inevitably results in the removal of registered voters who have not moved. *Id.* Moreover, targeting non-voters with confirmation notices has "the ultimate effect of . . . remov[ing] people for failure to vote, including those who may still reside in the same jurisdiction." *Id.* at 5-23. This has a greater impact on minorities, low-income voters, and those with language access issues, who "tend to vote at a lower rate."[64] Consequently, the FEC suggested that failure to vote not be a trigger unless there was (1) a minimum of four years of non-voting (covering at least one presidential election) *and* (2) a secondary basis, other than non-voting, upon which to send a confirmation notice.[65]

Ohio's Supplemental Process contravenes Congress's goals in enacting the NVRA. As indicated by more than 7,500 people who, in 2016, voted for the first time in more than six years, the Supplemental

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[64] Federal Election Commission, Implementing the National Voter Registration Act: A Report to State and Local Election Officials on Problems and Solutions Discovered 1995-1996, 5-22 (Mar. 1998), https://goo.gl/hWvytj; *see also id.* 5-41.

[65] Federal Election Commission, Implementing the NVRA of 1993: Requirements, Issues, Approaches, and Examples 5-23 (Jan. 1, 1994), https://goo.gl/cAMaQu.

Process has resulted in the purging of *hundreds of thousands* of people on the false assumption that they have moved. These are thousands of people who must now re-register even though their eligibility to vote had not changed since they last voted. As discussed, this practice disproportionately impacts Asian Americans and Latinos.

C. No Remedy for Voters Removed for Failure to Vote

If the Supplemental Process is upheld, individuals will continue to be removed from the rolls in Ohio on the purported basis that they have moved, even though they have not moved. The purged voters do not receive a notification from the Board of Elections that they have been purged from the rolls. In fact, the purged voter's last communication from the Board of Elections will have been the Confirmation Notice, which would have been sent at least four years prior to removal from the rolls.

Not knowing that they have been purged, voters may show up at their precincts to vote, only to be told that they are no longer registered to vote.[66] Ohio does not have same-day voter registration and will not count provisional ballots submitted by purged voters. And, because they did not know that they had been purged, they did not know to re-register 30 days before the election. These voters are

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[66] Andy Sullivan & Grant Smith, Use it or lose it: Occasional Ohio voters may be shut out in November, Reuters (June 2, 2016), https://goo.gl/ADPvXz ("People don't know they've been purged until they go to the election site and get turned away.").

fully disenfranchised under the Supplemental Process despite not falling into any of the permissible categories for removing a registrant from the list. 52 U.S.C. § 20507(a)(3), (a)(4).

Based on the data supplied by Ohio for the 2016 presidential election, over 7,500 people would have been disenfranchised had Ohio not counted the votes of those purged for not voting. Such widespread disenfranchisement is unacceptable and directly contravenes clear congressional intent.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX:

LIST OF ADDITIONAL *AMICI CURIAE*

The **Asian American Legal Defense and Education Fund** (AALDEF) is a 43-year-old national civil rights organization based in New York City that promotes and protects the civil rights of Asian Americans through litigation, legal advocacy, and community education. AALDEF has monitored elections through annual multilingual exit poll surveys since 1988. Consequently, AALDEF has documented both the use of, and the continued need for, protection under the Voting Rights Act of 1965, the Help America Vote Act, the National Voter Registration Act and the Fourteenth Amendment. AALDEF has litigated cases around the country under the language access provisions of the Voting Rights Act, and seeks to protect the voting rights of language minority, limited English proficient and Asian American voters. AALDEF is concerned that the purge process will disproportionately affect limited English proficient Asian American voters.

Asian Americans Advancing Justice - Asian Law Caucus, founded in 1972, is the nation's first legal and civil rights organization serving low-income Asian Americans. Advancing Justice - ALC strives to create informed and educated Asian American communities empowered to assert their rights and to participate actively in American society. As such, Advancing Justice - ALC has for several decades operated a voting rights program that ensures equal access to voter registration, language assistance in voting for limited-English

proficient voters, and fair redistricting that empowers Asian American communities. Based on this commitment to protecting the voting rights of marginalized communities, Advancing Justice - ALC has a strong interest in the outcome of this case.

Asian Americans Advancing Justice | Atlanta is the first legal and policy advocacy center dedicated to promoting the civil rights of Asian Americans, Native Hawaiians and Pacific Islanders in Georgia and the Southeast. Advancing Justice | Atlanta's efforts particularly focus on civic engagement and voter mobilization work to increase Asian voter participation in Georgia. This case directly impacts the voting rights of the communities Advancing Justice | Atlanta serves. Therefore, Advancing Justice | Atlanta has a strong interest in the outcome of this case.

Asian Americans Advancing Justice | Chicago is a pan-Asian non-profit organization whose mission is to empower the Asian American community through advocacy, coalition-building, education, and research. Founded in 1992, Advancing Justice | Chicago leads the largest non-partisan poll monitoring effort in the Midwest that is focused on protecting the voting rights of immigrants. Advancing Justice | Chicago has also advocated for redistricting that fairly recognizes minority communities, improved language assistance for limited English proficient voters, and increased democratic participation through policies such as Automatic Voter Registration. Based on this commitment to protecting the voting rights of marginalized communities, Advancing Justice |

Chicago has a strong interest in the outcome of this case.

Asian Americans Advancing Justice | Los Angeles was founded in 1983 and is the nation's largest nonprofit public interest law firm devoted to the Asian American, Native Hawaiian and Pacific Islander community. Advancing Justice | LA provides direct legal services to indigent members of our community and uses impact litigation, policy advocacy, community education and leadership development to obtain, safeguard and improve the civil rights of Asian Americans, Native Hawaiians and Pacific Islanders. Advancing Justice | LA's civil rights litigation has covered a broad range of issues such as racial polarized voting, race and national origin discrimination, access to higher education, immigration and naturalization, language rights and garment worker rights. Advancing Justice | LA has a long history of working to protect the voting rights of historically disenfranchised communities and thus has a strong interest in the outcome of this case.

Arizona Asian & Pacific Island American Vote Table (AZAPIAVT) is a non-partisan, non-profit organization dedicated to safeguarding the voting rights and advancing the voting participation of APIAs. AZAPIAVT empowers APIAs through voter education, voter registration and go out to vote (GOTV), and encourages participation in the democratic process to build a fair, equitable society for all Americans.

The **Coalition for Humane Immigrant Rights** (CHIRLA) is a California leader with national impact made of diverse immigrant families and individuals

who act as agents of social change to achieve a world with freedom of mobility, full human rights, and true participatory democracy. CHIRLA's mission is to achieve a just society fully inclusive of immigrants. CHIRLA organizes and serves individuals, institutions and coalitions to build power, transform public opinion, and change policies to achieve full human, civil and labor rights. For over 30 years, CHIRLA's innovative programming in community education, community organizing, legal services, civic engagement, policy, advocacy, and leadership development for youth, has served the immigrant communities of the Los Angeles region and across the country.

The **Council on American Islamic Relations, Ohio** (CAIR-Ohio) is a nonprofit civil rights organization for Muslims in Ohio. CAIR-Ohio's mission is to enhance understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and mutual understanding. CAIR-Ohio advances its mission through public outreach, education, advocacy with government, and litigation. CAIR-Ohio encourages the Muslim community to become more politically engaged through regular voter education and voter registration on a nonpartisan basis. CAIR-Ohio has a long history of promoting the voting rights of the Ohio Muslim community. In 2006, CAIR-Ohio successfully sued then Ohio Secretary of State J. Kenneth Blackwell on voting requirements which discriminated against naturalized citizens. CAIR-Ohio seeks to empower naturalized citizens to fully participate in American

democracy and opposes all laws which make voting more difficult.

Fair Elections Legal Network is a national, non-partisan voting rights, legal support, and election reform organization whose mission is to remove barriers to registration and voting for traditionally underrepresented communities. It also works to improve overall election administration by administrative, legal, and legislative reform efforts and strives to make the processes of voter registration, voting, and election administration as accessible as possible for every American, with a particular focus on students, youth, immigrant communities, and minority voters. As such, the organization has provided guidance and technical assistance to organizations seeking to provide voter registration services to eligible voters from these constituencies. Fair Elections Legal Network has an interest in this case because the procedures being challenged disproportionately affect the voting rights of many of the constituencies the organization works with in an effort to maximize the ability to register and to vote. The organization expends resources to provide information, technical assistance, and training to non-partisan civic engagement organizations including language minority organizations in Ohio and around the country. Fair Elections Legal Network fully supports the arguments that Respondents make on the merits as to why the actions of the Ohio Secretary of State involving the state's supplemental process disproportionately affects language-minority Asian-American and Latino voters and should be enjoined.

The **Hispanic Association of Colleges and Universities** (HACU), founded in 1986 and headquartered in San Antonio, Texas, represents more than 470 colleges and universities committed to Hispanic higher education success in the U.S. and Puerto Rico. HACU's member institutions enroll two-thirds of the nation's Hispanic college students and six million students altogether. Hispanics, and especially Hispanic students, are vulnerable to the contested procedures to remove citizens from voter rolls because they have had historically lower voter participation rates. This lower participation is particularly true for younger Latinos/as.

The membership of *amicus curiae* the **Hispanic National Bar Association** (HNBA) comprises thousands of Latino lawyers, law professors, law students, legal professionals, state and federal judges, legislators, and bar affiliates across the country. The HNBA supports Hispanic legal professionals and is committed to advocacy on issues of importance to the 53 million people of Hispanic heritage living in the United States. The HNBA regularly participates as *amicus* in cases concerning immigration and protection of refugees.

The **Immigrant Legal Resource Center** (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of

immigrant families and communities. The ILRC has a direct interest in this case, because ILRC supports civic participation by immigrant communities, including through civic engagement programs that train immigrants and their families to advocate on their own behalf and become more engaged in their community. The ILRC leads the New Americans Campaign, which helps lawful permanent residents apply for naturalization. Once naturalized, these new Americans may exercise their right to vote. New Americans Campaign partners have helped nearly 300,000 lawful permanent residents apply for U.S. citizenship nationally, including in Ohio.

The **Jewish Council for Public Affairs** is the national voice for more than 125 local Jewish Community Relations Councils and Community Engagement Committees, and 16 national Jewish agencies. Its mandate is to advance the interests of the Jewish people and to promote a just American society.

The **National Asian Pacific American Bar Association** (NAPABA) is the national association of Asian Pacific American attorneys, judges, law professors, and law students, representing the interests of over eighty state and local Asian Pacific-American bar associations and nearly 50,000 attorneys who work in solo practices, large firms, corporations, legal services organizations, nonprofit organizations, law schools, and government agencies. Since its inception in 1988, the National Asian Pacific American Bar Association has served as the national voice for Asian Pacific Americans in the legal profession and has promoted justice, equity,

and opportunity for Asian Pacific Americans. NAPABA has consistently supported protections for and the inclusion of limited English proficient individuals throughout the legal and voting system.

The **National Association of Jewish Legislators** (NAJL) is an organization for Jewish state and local elected officials in the United States. NAJL is committed to equal justice and the right of all Americans to be able to register to vote and to participate in electoral politics without encumbrance.

The **National Council of Jewish Women** (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Election laws, policies, and practices that ensure easy and equitable access and eliminate obstacles to the electoral process so that every vote counts and can be verified." Consistent with our Principles and Resolutions, NCJW joins this brief.

The **National Latina/o Psychological Association** (NLPA) is a nonprofit and nonpartisan organization of mental health professionals, academics, researchers, and students whose objective is to create a supportive professional community that advances psychological education, training, science, practice, and organizational change to enhance the health, mental health, and well-being of Latina/o communities. This includes challenging any and all efforts that stand in the way of having one's voice

heard and counted in the democratic process. As such, the NLPA is committed to efforts that can transform the election system into one that is affirmative of the rights of all, particularly our most vulnerable, marginalized, and Spanish speaking populations.

OneAmerica is a nonprofit, non-artisan organization whose mission is to advance democracy and justice through building power in immigrant and refugee communities with key allies in the State of Washington. Founded in 2001, in service to this mission OneAmerica engages in nonpartisan, in-language voter registration, get out the vote, voter protection and policy advocacy to ensure effective representation of low-income, immigrant and refugee communities of color, including Latino, African, Asian American and Pacific Islander communities. These communities are historically under-represented populations and are registered to vote at much lower rates than the overall population. As a consequence, our community members bear disproportionate impacts in policy making, including OneAmerica's policy priorities related to voting rights, immigration and refugee policy, education and environmental policy. We are deeply concerned over policies that would hamper the democratic participation of these communities.

People For the American Way Foundation (PFAWF) is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including the right to vote and the rights of Asian American and Latino communities in the United States. Founded in 1981

by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values and to help overcome barriers to voting and political participation. In particular, PFAWF has conducted and continues to conduct significant voter education and mobilization activities aimed at traditionally disenfranchised persons, including Latinos and Asian Americans, and those efforts would be materially harmed by state efforts to purge voters for not voting in past elections. PFAWF accordingly joins this brief.